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# IT'S NOT LAW—THE WAR GUILT TRIALS

BY ORVILLE C. SNYDER\*

## I

### INTRODUCTION

Several times now the Supreme Court of the United States has indicated that it has nothing to do with the new jurisprudence<sup>1</sup> of the war-guilt trials. Throughout the stream of applications by the condemned from early in 1946 through 1948, the Court persistently disclaimed jurisdiction in whole or in part. There have been notable dissents but these do not alter that record.

The first case, *Yamashita v. Styer*,<sup>2</sup> was decided February 4, 1946. This case, coming up from an wholly American military commission, was presented by motions for leave to file petitions for a writ of habeas corpus and a writ of prohibition, by petitions for a writ of habeas corpus and a writ of prohibition, and by a petition for a writ of certiorari. All raised "substantially like questions"<sup>3</sup> and all were denied. Mr. Chief Justice Stone in delivering the opinion of the Court said "For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities."<sup>4</sup> In October 1946 decisions on the German cases<sup>5</sup> began. These cases were presented by motions for leave to file petitions for writs of habeas corpus and were disposed of by the

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<sup>1</sup> In the sense of a body of principles. "*Jurisprudence*. This term has several meanings. It may mean chiefly the whole or some part of the whole body of law. Thus Anglo-American Jurisprudence has the same meaning as Anglo-American law. Sometimes it means the course of decision of a particular court as when one speaks of the jurisprudence of the Supreme Court of the United States." KOCOUREK, *AN INTRODUCTION TO THE SCIENCE OF LAW* (Boston, 1930), p. 55.

<sup>2</sup> 327 U. S. 1, 66 S. Ct. 340.

<sup>3</sup> *Id.*, 66 S. Ct. at 343.

<sup>4</sup> *Id.*, 66 S. Ct. at 351.

<sup>5</sup> *Ex Parte Betz*, 329 U. S. 672, 67 S. Ct. 39 (Oct. 14, 1946), and companion cases; see cases listed in footnote to *Koki Hirota v. MacArthur*, —U. S.—, 69 S. Ct. 157, 158 (Dec. 6, 1948)

Court, divided four to four. Mr. Justice Jackson did not participate. Four members of the Court consistently took the position that, under Article III, section 2, clause 2 of the Constitution, there was no jurisdiction. Then the case of *Koki Hirota v MacArthur*<sup>6</sup> and two other Japanese cases were presented by like motions and, on December 6, 1948, Mr. Justice Jackson broke the deadlock by voting for full hearing on the point of jurisdiction. On December 20, 1948,<sup>7</sup> after full argument "on the question of our power to grant the relief prayed," the Court, *per curiam*, held that "the tribunal sentencing these petitioners is not a tribunal of the United States [but] the agent of the Allied Powers. Under the foregoing circumstances the courts of the United States have no power to review, to affirm, set aside or annul the judgments and sentences."<sup>8</sup>

#### INITIAL EFFECT OF DECISIONS

Thus the Court has declined to answer questions which must be answered before it can be said whether the war-guilt trials represent justice according to law, as law is understood in our legal system, or justice according to something else. The effect of these decisions is that the new jurisprudence has not received, from that tribunal, which is symbolic to us of all that law is, the accolade of juristic legitimacy

But, what is the law? Or, more accurately, what is indispensably necessary for a mode of inflicting punishments to amount to law?

## II

#### REQUISITES OF LEGALITY

In our land, "law is simply a method of protecting freedom."<sup>9</sup> Current expression of this identification of law with liberty is found in President Truman's inaugural address, and the principle goes far back to that *beau systeme* "first invented in the woods."<sup>10</sup> Whence it was taken by the Angles and Saxons to England and there developed into those "fundamental rights

<sup>6</sup> — U. S. —, 69 S. Ct. 157.

<sup>7</sup> — U. S. —, 69 S. Ct. 197.

<sup>8</sup> *Id.*, at 198.

<sup>9</sup> KOCOUREK, *supra* n. 1, p. 251.

<sup>10</sup> MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Nugent Translation New York, 1900), p. 195.

of Englishmen”<sup>11</sup> on which, especially the historic expression of their spirit in Magna Carta, the Colonists rested their case “to a candid world.”<sup>12</sup> This identification of law with liberty is immanent in the Constitution. Commonly phrased in words of our time, as follows “a government of laws and not of men,” it was known in Bracton’s day in the form, *Rex non debet sub homine sed sub Deo et lege*, the totality of which is, “there is no sovereign unless he conform to the principles of legality”<sup>13</sup> All else is tyranny “It is the law and the law only which can successfully resist the encroachments of despotism.”<sup>14</sup> “Where law ends, tyranny begins.”<sup>15</sup> and “rebellion to tyrants is obedience to God.”<sup>16</sup> (A little eloquence is relished by the best of lawyers as by the best of other men.)

Furthermore, as there is no sovereign without legality, there is no legality without due process.<sup>17</sup> A recent assertion of this principle pops up also in President Truman’s inaugural address, where he speaks of the individual being subjected “to arrest without lawful cause, punishment without trial.”<sup>18</sup> Webster’s classic exposition of what is meant by law is along the same line “By law of the land is most clearly intended the general law, a law, which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.”<sup>19</sup> And the idea had still more famous utterance in that 39th Chapter, to wit. “No freeman shall be taken and imprisoned or disseized or exiled

<sup>11</sup> POLLOCK AND MATLAND, *THE HISTORY OF ENGLISH LAW* (Cambridge, 1911), p. xxx; BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Cooley, 4th ed. by Andrews, Chicago, 1899), Vol. I, p. 64, Vol. IV, Chap. 33; DICEY, *LAW OF THE CONSTITUTION* (London, 1926), Chap. IV; STEPHEN ON PLEADING (3rd Am. ed., Washington, 1882), Introduction, p. 20; MOTT, *DUE PROCESS OF LAW* (Indianapolis, 1926), p. 589; WALSH, *HISTORY OF ANGLO-AMERICAN LAW* (2nd ed., Indianapolis, 1932), p. 1, REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* (Madison, 1899), Introduction, pp. 5-10; ZANE, *THE STORY OF LAW* (New York, 1928), p. 114.

<sup>12</sup> See MOTT, *supra* n. 11, pp. 135, 136, 589.

<sup>13</sup> MOTT, *supra* n. 11, p. 589.

<sup>14</sup> STEPHEN, *supra* n. 11, p. 19; see also p. 23.

<sup>15</sup> Wm. Pitt, Earl of Chatham, Case of Wilkes, Jan. 9, 1770.

<sup>16</sup> An inscription on the cannon near which the ashes of President John Bradshaw were lodged, on the top of a high hill near Martha Bay in Jamaica. Also found among papers of Thomas Jefferson in his handwriting. BARTLETT, *FAMILIAR QUOTATIONS* (10th ed.), p. 1051.

<sup>17</sup> MOTT, *supra* n. 11, p. 589.

<sup>18</sup> New York World-Telegram, Jan. 20, 1949.

<sup>19</sup> See MOTT, *supra* n. 11, p. 202, n. 41.

or in any way destroyed, nor will we go upon him nor send upon him except by the lawful judgment of his peers or the law of the land." This "version of natural right"<sup>20</sup> is the concept of law embodied in the guaranties of all our constitutions.<sup>21</sup> But it is much more venerable than that. It is inherent in the development of law. "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being secreted in the interstices of procedure."<sup>22</sup> Nor is that pristine vigor spent in modern times, since "the forms of action we have buried but they still rule us from their graves."<sup>23</sup> The past and the present are instinct with the sense of the maxim *ubi jus ibi remedium* which, far from being "a mere tautological proposition," sums up the "inseparable connection between the means of enforcing a right and the right to be enforced."<sup>24</sup>

In such a legal system, little stress is wasted on divine-right theories of law or perfect rules so sacred that redressing their violation becomes a matter of "avenging Deity's cause."<sup>25</sup> Discarded is the proposition that the end justifies the means.<sup>26</sup> Law in action is no mere cracking down before which all must be still and know it is the law, with plenty of resulting bigotry

In contrast, our law breathes a spirit of greater humility. It pretends to no all-sufficient body of knowledge. It does not assume that something beyond the "moral and intellectual capacity"<sup>27</sup> of men does its work. But it harbors no philosophic despair over the absence of an infallible prescience to guarantee its judgments, nor over the fact that those judgments must, like all the other works of men, stand the acid test of being known

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<sup>20</sup> HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (Cambridge, 1936), p. 122; cf. MOTT, *supra* n. 11, p. 252.

<sup>21</sup> See *Bank of Columbia v. Okely*, 4 Wheat. (U.S.) 234, 241, 244 (1819).

<sup>22</sup> MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (Cambridge, 1936), p. 1, quoting MAINE, *EARLY LAW AND CUSTOM*, p. 389. See also HOLMES, *THE COMMON LAW* (Boston, 1938), pp. 253, 254.

<sup>23</sup> MAITLAND, *supra* n. 22, p. 2.

<sup>24</sup> DICEY, *supra* n. 11, p. 194; see also MAITLAND, *supra* n. 22, p. 6, quoting Bracton, *Tot erunt actiones quot sunt formulae brevium*.

<sup>25</sup> See MONTESQUIEU, *supra* n. 10, p. 227.

<sup>26</sup> Cf. The Epistle to the Romans, 2:7, 8: "For if the truth of God hath more abounded through my life unto His glory; why yet am I also judged as a sinner. And not rather (as we be slanderously reported, and as some affirm we say) Let us do evil that good may come? whose damnation is just."

<sup>27</sup> See for this phrase President Truman's inaugural address, *New York World-Telegram*, Jan. 20, 1949.

by their fruits.<sup>28</sup> Mistakes do occur<sup>29</sup> but our courts have "from the beginning rejected a doctrine of disability at self-correction."<sup>30</sup> Instead, right here, it is insisted in our system, is where legality has its habitat—in painstaking care and repeated effort to inquire fully and avoid error, through which alone can the law preserve, protect, and defend the liberty and dignity of man against the depredations of know-it-alls with the ready-made wisdom. This sense, as to the indispensable element which anything claimed to be law must have, is written into the due-process guaranties of all our constitutions, but is even more manifest in provisions for clemency, in the jury's general verdict, in opportunity for review, in presumptions and burden of proof, and most signally in everyday rules of evidence.<sup>31</sup> As we understand law, the characteristic which makes any body of rules applying to human conduct amount to law, is that it embodies the processes of fair judgment.<sup>32</sup>

But what are the requisites of due process of law?

#### REQUISITES OF DUE PROCESS

##### *Level of Inquiry*

This is a task not to be approached in the spirit of a pettifogger with "his quiddities" and "quillies, his cases, his tenures, and his tricks."<sup>33</sup> As Mr. Justice Jackson points out, "the issues here are truly great ones,"<sup>34</sup> and, as Mr. Justice Rutledge joins in, "more is at stake than General Yamashita's fate,"<sup>35</sup> for involved are "the traditions of the common law and the Constitution"<sup>36</sup> and the "long-held attachment which marks the

<sup>28</sup> Cf. The Gospel according to St. Matthews, 7:16, 20: "Wherefore by their fruits ye shall know them."

<sup>29</sup> Cf. GOGOL, *DEAD SOULS* (Modern Library), v 2, bk. 1, chap. 2, p. 25.

<sup>30</sup> Frankfurter, J., in *Helvering v. Hallock*, 309 U.S. 106, 60 S. Ct. 444, 452-3 (1940)

<sup>31</sup> Consider the use of confessions in our system with the preoccupation with confessions as the mystically perfect form of proof in the system of the Soviets. Cf. MONTAIGNE, *Of the Useful and the Honest*, ESSAYS (Modern Library), p. 688.

<sup>32</sup> Cf. The Gospel according to St. Matthews, 23:23: "for ye pay tithe of mint and anise and cummin, and have omitted the weightier matters of the law, judgment, mercy, and faith."

<sup>33</sup> Hamlet, Act V, Sc. 1.

<sup>34</sup> *Koki Hirota v. MacArthur*, *supra* n. 6, at 159.

<sup>35</sup> *Yamashita v. Styer*, *supra* n. 2, at 360.

<sup>36</sup> *Id.* at 366.

great divide between our enemies and ourselves.”<sup>37</sup> Consequently, many things germane to due process and ordinarily important may be largely or entirely ignored. These trials, it was hoped, would usher in “a new era of law”<sup>38</sup> which all men could understand. An effort will be made, therefore, to stick to the plainest things.

There can, for instance, be little profit in cavilling that the victors sat in judgment on the vanquished. If a “new era of law” were to get started, that was the only way to do the job. The vanquished could not very well have sat in judgment on the victors and there are no neutrals any more who could have done anything the victors did not want. Nor is there any sense in complaining that the Russians sat beside us. However false their philosophy,<sup>39</sup> they are our allies. We vouched for them, if in no other way, by getting them into the war with Japan, and the announcement of that feat brought nothing but gladsome cries from the great heart of our people. (Of course, some may say they were got in by selling China down the river and that the selling-down was not announced when the word of their entry was given out, but that seems rather to disqualify us and so we had best be quiet about it.)

Hustling counsel is mentioned in the dissents in the *Yamashita case*.<sup>40</sup> Yet the defense performed “their difficult assignment with extraordinary fidelity”<sup>41</sup>—and enough success to carry two Justices with them. Anyway, counsel frequently is quite resolute in such situations, counsel exists for that very purpose, among others, and more time is not necessarily due process, it being simply wonderful what can be accomplished when one puts his mind to it. Plain folks probably see this sort of thing as lawyers’ squabbling. Moreover, if there was intimidation of witnesses or subornation, as in the Malmady massacre case,<sup>42</sup> that is an abuse, within our system as in all systems, and not a denial of our system or the inauguration of another system. Disputes over the technical constitution of a court or commission, over interpretation of specific articles of

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<sup>37</sup> *Id.* at 360.

<sup>38</sup> *Id.* at 360.

<sup>39</sup> See President Truman’s inaugural address, New York World-Telegram, Jan. 20, 1949.

<sup>40</sup> *Yamashita v. Styer*, *supra* n. 2, dissent, at 360.

<sup>41</sup> *Id.* at 361.

<sup>42</sup> See Time, Jan. 17, 1949, p. 19.

war or other provisions, or over conflicts between some of these, again probably look like "quilllets" or "quiddities" to most of mankind, for whom, it was supposed, we were erecting standards. Likewise, many differences of opinion on jurisdictional questions seem more in the nature of dotting i's and crossing t's.

However, certain requisites of due process of law are plain enough. We shall stick to these, namely,<sup>43</sup> (1) an ascertainable standard of conduct, (2) evidence, and (3) equality. Since the "conception of due process has always revolved around the idea of criminal procedure"<sup>44</sup> and since the war-guilt trials involved capital sanctions, these requisites are considered in their criminal setting.

#### *An Ascertainable Standard of Conduct*

The requisite of an ascertainable standard of conduct has some relation to informing the accused of the charge in time for him to make a defense. Thus, at the time of accusation and trial, what it is claimed the accused has done must be set out with particularity and the law which his conduct violated must be specific. "No man is punishable except for a distinct breach of law."<sup>45</sup> But the requisite of an ascertainable standard of conduct goes further. The law denouncing an offense must ante-date its commission, so that the accused could have obeyed that law, had he wanted to do so.<sup>46</sup> The law must not be *ex post facto* and this "principle of justice" is older than the prohibition in the Constitution and the adoption of the Fifth Amendment. It is a principle of the common law.<sup>47</sup> Scholars have regarded it as implicit in the idea of law.<sup>48</sup> Judgment according to what has previously been laid down "is of surpassing importance" and the basis upon which "the whole elaborate structure of our case-law has been built up."<sup>49</sup> According to Blackstone, unless the law penalizing a man for an act is notified in advance, "he had therefore no cause to abstain from it, and all punishment for

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<sup>43</sup> See EVANS, *CASES ON AMERICAN CONSTITUTIONAL LAW* (3rd ed. by Throckmorton, Chicago, 1933), note, pp. 809-10.

<sup>44</sup> MOTT, *supra* n. 11, p. 83; see also p. 123.

<sup>45</sup> DICEY, *supra* n. 11, p. 244; see also p. 183.

<sup>46</sup> See Snyder, *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121, 147 (1940), and authorities there cited.

<sup>47</sup> *Id.* at 143 *et seq.* and authorities there cited.

<sup>48</sup> See KOCOUREK, *JURAL RELATIONS* (Indianapolis, 1927), p. 3.

<sup>49</sup> BLACK, *LAW OF JUDICIAL PRECEDENTS* (St. Paul, 1912), p. 183.



not abstaining must of consequence be cruel and unjust."<sup>50</sup> In short, a "pre-existing rule of conduct"<sup>51</sup> must have been set up by "a regular enacted law."<sup>52</sup>

The pre-existing rule need not, however, be statutory. Though there are no common-law offenses against the United States and some of the States any more, our legal system does include an unwritten law of crimes.<sup>53</sup> In that law, precedents supply the pre-existing rule and requisite certainty.

But in a case-law system, where there is no precedent, decision may be made "on principle."<sup>54</sup> That is how "original precedents" come about.<sup>55</sup> Moreover, in our "doctrine of precedents," that companion element of *stare decisis*, the declaratory theory, is to the effect that "cases do not make law, but are only the best evidence of what the law is."<sup>56</sup> In overruling a precedent, for instance, it is said there is merely a return to pre-existing principle. And the common law of crimes, including as it does ideas expressed by the phrases *contra bonos mores*<sup>57</sup> and *malum in se*,<sup>58</sup> provides shoals and shoals of general principles of right and wrong, supposedly known naturally to everybody. If criminal prosecutions can be grounded on these general moral principles, the requisite of pre-existing rule and distinct breach is a myth. Retroactivity lies at the very heart of our law. Nothing like an ascertainable definition of the way in which something morally wrong must be committed for that form of conduct to amount to a legal offense, is required at all. It has, in modern times, even been argued that, since in any case "the judge's decision is in every sense of the word *ex post*

<sup>50</sup> BL. COMM., I., 45. Cf. MONTAIGNE, ESSAYS (translation by E. J. Trechman, London, 1935), *Cowardice is the Mother of Cruelty*, p. 141. "The killing after victory is usually done by the rabble and the baggage-officials."

<sup>51</sup> HAINES, *supra* n. 20, p. 115.

<sup>52</sup> HAINES, *supra* n. 20, p. 122; *International Harvester Co. v. Kentucky*, 234 U.S. 216, 34 S. Ct. 853 (1913), *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298 (1920), *Cummings v. Missouri*, 4 Wall. (U.S.) 277 (1867), test-oath cases, listed in MOTT, *supra* n. 11, p. 312, n. 35.

<sup>53</sup> See MILLER ON CRIMINAL LAW (St. Paul, 1934), pp. 27-32; SAYRE, CASES ON CRIMINAL LAW (Rochester, 1930), pp. 57-63.

<sup>54</sup> BLACK, *supra* n. 49, p. 159.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Snyder, *supra* n. 46, p. 122, and authorities there cited.

<sup>57</sup> See WAITE, CASES ON CRIMINAL LAW AND PROCEDURE (Chicago, 1931), pp. 23-36.

<sup>58</sup> See MILLER, *supra* n. 53, p. 23.

*facto*,"<sup>59</sup> retroactivity and uncertainty are objectively unavoidable."<sup>60</sup> This classifies more as *bon mot* than as serious assertion that in law, since different measurers may get varying totals, no yardstick nor table of measures is provided in advance or, if they are, they do not mean anything. But along with the other foregoing considerations, it does help to make one wonder where the pre-existing rule of enacted law would be in any case where no "original precedent" had been laid down. But that is only an ostensible difficulty and there is no use in getting "balmy" about it. We do not have to go back to the days of *wer* and *wite* and *bot* and start speculating around. Throughout all the days of our years, there have been plenty of definitive precedents<sup>61</sup> and it would be odd indeed to find, since the Constitutional Fathers wrote their immortal document, a prosecution for any act not previously defined by the processes of judicial inclusion and exclusion or by a duly enacted statute.

The authorities do not leave us incontinently up in the air. Who supposes that a criminal prosecution could be maintained under the moral law, "thou shalt not kill"?<sup>2</sup> *Exodus*<sup>62</sup> and *Deuteronomy*<sup>63</sup> are full of specifications of that general principle. *Numbers*<sup>64</sup> contains elaborate details on murder. Some killings are lawful and some unlawful. Those unlawful are not all visited with identical denunciation. In the same revelations out of which the *Decalogue's* "thou shalt not kill" came, war of conquest in Canaan was enjoined.<sup>65</sup> These detailed definitions, the differentiations in degree, and the discrimination between lawful and unlawful killings, etc. are no less necessary to our law. Anti-retroactivity is there and its elements are defined within practicable limits.

While the pre-existing rule need not be so precise as a common-law indictment<sup>66</sup> or so explicit as to exclude all possibility of difference in judgment between the accused and a jury,<sup>67</sup> there

<sup>59</sup> FRANK, *LAW AND THE MODERN MIND* (New York, 1930), p. 116; see also pp. 34, 173, and 224.

<sup>60</sup> *Id.* at 329.

<sup>61</sup> See Snyder, *supra* n. 46, p. 125.

<sup>62</sup> Chaps. 20, 21, 33, 34.

<sup>63</sup> Chap. 21, *et seq.*

<sup>64</sup> Chap. 35:16-29.

<sup>65</sup> Deuteronomy 7:16.

<sup>66</sup> *Yamashita v. Styer*, *supra* n. 2, at 349.

<sup>67</sup> *Nash v. United States*, 229 U.S. 373, 33 S. Ct. 780, 781 (1912)

must be a "standard of conduct that it is possible to know."<sup>68</sup> Matters cannot be left to what is deemed "unjust and unreasonable in the estimation of court and jury"<sup>69</sup> "While the criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested more circumspect conduct,"<sup>70</sup> some "specific and definite act"<sup>71</sup> must be denounced.

### *Evidence*

The requisite of full proof, usually subsumed under the rubric of notice and hearing, is embodied in several provisions of all our constitutions, such as, those against bills of attainder and those for jury trial, counsel, and compulsory process to obtain evidence. Beyond any and all of these, however, this requirement is rooted in that basic due process of law which antedates the Constitution. It is another principle of justice "so rooted in the traditions and conscience of our people as to be ranked fundamental."<sup>72</sup> Courts of justice cannot proceed arbitrarily but only on inquiry and evidence.<sup>73</sup>

Evidence and its concomitant burden of proof are the gist of notice and hearing. Why? While getting the facts, a fair trial, and so forth, are usually thought of as measures for the protection of the accused, they are not required just to promote a spirit of sportmanship. If it were merely desired to give the accused a break, that could be as well accomplished by guaranteeing him a doughty champion or allowing his champion a longer sword. Why the insistence on dull evidence? What is it for? For it is silly, as every layman knows, to take evidence if the truth is no better known after than before. The law insists on no such vain thing nor does it exist to give lawyers jobs, whatever so-called wits may sneaker.

"Evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted

<sup>68</sup> *International Harvester Co. v. Kentucky*, *supra* n. 52, at 855.

<sup>69</sup> *United States v. Cohen Grocery Co.*, *supra* n. 52, at 300.

<sup>70</sup> *Nash v. United States*, *supra* n. 67, at 781.

<sup>71</sup> *United States v. Cohen Grocery Co.*, *supra* n. 52, at 299.

<sup>72</sup> *Cf. Snyder v. Massachusetts*, 291 U.S. 97, 54 S. Ct. 330, 332 (1934).

<sup>73</sup> *Twining v. New Jersey*, 211 U.S. 78, 29 S. Ct. 14 (1908). See MOTT, *supra* n. 11, Chap. XIII; and authorities cited in HALL, CASES ON CONSTITUTIONAL LAW (St. Paul, 1913), notes pp. 283, 285, 286.

to investigation, is established or disproved.' ''<sup>74</sup> That's it. The matters are only "alleged." We want to get at the truth of them. That is the real purpose of notice and hearing, the function of evidence, and the reason the accused is permitted to appear and defend, to have counsel and compulsory process. Exclusionary rules, which are so characteristic of our law of evidence,<sup>75</sup> are themselves but devices to aid<sup>76</sup> the search for truth by keeping out matters which only confuse or mislead. We want to bring out the whole story. Our trials are not supposed to be sporting events nor mystic ordeals but sane inquiries into the truth of matters alleged.

### *Equality*

Concerning the requisite of equality, little needs saying here. This is anti-discrimination about which so much has been said of late and about which the war seems to have been fought. The requirement is that no person shall be denied due process of law. The accent is on the *no* and that means everybody gets the same dose—good and bad, white and black, and in-between.<sup>77</sup>

Usually referred to the guaranty of "equal protection of the laws" this requisite is equally an integral part of basic due process of law<sup>78</sup> and really implicit in full proof with its inseparable burden of proof and presumption of innocence.

## III

### THE TRIALS AND DUE PROCESS OF LAW

#### YAMASHITA

#### *The Ascertainable Standard of Conduct*

"The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, 'while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disre-

<sup>74</sup> RICHARDSON ON EVIDENCE (7th ed. by Jerome Prince, Brooklyn, (1948), p. 1, quoting GREENLEAF ON EVIDENCE, 16th ed., sec. 1.

<sup>75</sup> THAYER, A PRELIMINARY TREATISE ON EVIDENCE (Boston, 1898), p. 264.

<sup>76</sup> WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF (2nd ed., Boston, 1931), Chap. I.

<sup>77</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1880).

<sup>78</sup> MOTT, *supra* n. 11, p. 276 and *passim* Chap. XV, and authorities there cited.

garded and failed to discharge his duty as commander to control operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines, and he thereby violated the laws of war.' Bills of particulars, filed by the prosecution allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command, during the period mentioned.''<sup>79</sup>

Of this charge, the Court says "Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment we conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war.'"<sup>80</sup>

The Court finds that an ascertainable standard of conduct had previously been established as early as 1907 in the Fourth Hague Convention and 1929 at the Geneva Red Cross Convention;<sup>81</sup> that in 1942 "the President proclaimed that enemy belligerents who, during time of war, enter the United States, or any territory in possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals,"<sup>82</sup> that paragraph 10 of the Declaration of Potsdam of July 6, 1945, declared that "stern justice shall be meted out to all war criminals including those who have visited cruelties upon prisoners," and that "this Declaration was accepted by the Japanese government by its note of August 10, 1945."<sup>83</sup>

Mr. Justice Murphy, dissenting, says that all this is "a cloak of false legalism" and continues "Nothing in all history or in international law justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault. Even the laws of

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<sup>79</sup> *Yamashita v. Styer*, *supra* n. 2, at 347.

<sup>80</sup> *Id.* at 349.

<sup>81</sup> *Id.* at 348.

<sup>82</sup> *Id.* at 345.

<sup>83</sup> *Id.* at 345.

war heretofore recognized by this nation fail to impute responsibility to a fallen commander for excesses committed by his disorganized troops while under attack. In no recorded instance

has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge violating the laws of war.

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history''<sup>84</sup>

Mr. Justice Rutledge, dissenting, says "This trial is unprecedented in our history. Never before have we tried and convicted an enemy general for action taken during hostilities or otherwise in the course of military operations. Much less have we condemned one for failing to take action. The novelty is legal as well as historical. We are on strange ground. It is not in our tradition for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place, or in language not sufficient to inform him of the nature of the offense or to enable him to make defense. My Brother MURPHY has discussed the charge with respect to the substance of the crime. With his conclusions in this respect I agree."<sup>85</sup>

The over-all impression from these opinions induces, with some slight hesitancy, the belief that the charge was specific enough and was based on documents sufficiently definitive and in existence before the offense was committed. The principal difficulty arises from the fact that we do have a doctrine of judicial supremacy and from the position the Supreme Court had taken in the time of John Marshall that "the laws of no nation can justly extend beyond its own territories except so far as regards its own citizens."<sup>86</sup> and had adhered to nearly a century later, as follows "Law is a statement of circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts.

Words having universal scope will be taken, as a matter of course to mean only everyone subject to such legislation, not

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<sup>84</sup> *Id.* at 354-59.

<sup>85</sup> *Id.* at 360-62.

<sup>86</sup> *The Apollon, 9 Wheat. (U.S.) 362, 370 (1824).*

all that the legislator subsequently may be able to catch."<sup>87</sup> Since "the criterion is whether common social duty would, under the circumstances, have suggested more circumspect conduct,"<sup>88</sup> it is pretty farfetched to assert that anybody could have foreseen, let alone did apprehend, that the contents of these documents were applicable, in the way they were applied, to the conduct of the commander of a foreign army. While the Court does not say, as it does concerning the evidence, that the charge was not tested by the standards of due process of law, the opinion leaves no impression that it was.

### *The Evidence*

The opinion of the Court says "We do not appraise the evidence on which petitioner was convicted."<sup>89</sup> which was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt."<sup>90</sup>

Mr. Justice Murphy says "Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different. Instead the loose charge was made that great numbers of atrocities had been committed and that petitioner was the commanding officer; hence he must have been guilty of disregard of duty."<sup>91</sup>

Mr. Justice Rutledge says "Every conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed, or oral, and one 'propaganda film' were allowed to come in, most of this relating to atrocities committed by troops under petitioner's command throughout the several thousand islands of the Philippine Archipelago during the period of active hostilities covered by the American forces' return to and recapture of the Philippines. But there is not a suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents, with the exception of the wholly inferential suggestion noted below.

This vagueness, if not vacuity, in the findings runs through-

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<sup>87</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S. Ct. 511, 512-13.

<sup>88</sup> *Nash v. United States*, *supra* n. 67, at 781.

<sup>89</sup> *Yamashita v. Styer*, *supra* n. 2, at 348.

<sup>90</sup> *Id.* at 349.

<sup>91</sup> *Id.* at 359.

out the proceedings from the charge itself through the proof and findings, to the conclusion. And in that state of things petitioner has been convicted of a crime in which knowledge is an essential element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military, Petitioner asserts, and there can be no reason to doubt, that by the use of all this forbidden evidence he was deprived of the right of cross-examination and other means to establish the credibility of the deponents or affiants, not to speak of the authors of reports, letters, documents, and newspaper articles. Further comment is hardly required.”<sup>92</sup>

Mr. Justice Rutledge concludes “The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done.

All this the Court puts to one side with the short assertion that no question of due process under the Fifth Amendment or jurisdiction reviewable here is presented.”<sup>93</sup> Mr. Justice Murphy says that “petitioners’s rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification.”<sup>94</sup>

The Court further says that the conviction was not “without the support of evidence.”<sup>95</sup> “The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government.”<sup>96</sup> “We cannot say that the commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty, or military command defining the commission’s authority. For reasons already stated we hold that the commission’s rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situa-

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<sup>92</sup> *Id.* at 363-68.

<sup>93</sup> *Id.* at 377-78.

<sup>94</sup> *Id.* at 359.

<sup>95</sup> *Id.* at 348.

<sup>96</sup> *Id.* at 347.



tions, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied."<sup>97</sup>

All opinions agree that the evidence was not weighed in the scales of due process of law. The Court says that there was evidence but does not say whether that evidence, if tested by the standards of due process, would have been deficient to a degree requiring annulment of the conviction, or enough to justify its affirmance. Had the Court believed the evidence sufficient by the standards of due process of law, it is strange that it did not say so in support of its decision, instead of painstakingly removing the Fifth Amendment out of the picture and carefully pointing up the political authorization of the proceedings.

The conclusion seems inescapable, therefore, that the causal connection between Yamashita's acts and/or omissions was not established by evidence of the value which due process requires.

### *Equality*

It is enough to call attention to the trial of Communist leaders now in progress in New York. This aspect need not be labored, since it would have little significance had there been full proof.

### TOJO AND GOERING

These two names are convenient symbols, although neither appears in any case, of the two main trials of the war-lords, which are those in which everybody is interested. The German cases<sup>98</sup> and the *Hirota case* indicate plainly the Court's position in regard to these two trials. Since we have no judicial record here, as in the *Yamashita case*, all decisions announcing only disclaimer of jurisdiction, recourse is had to public prints, but sufficient salient facts there recorded seem to be beyond dispute.

### *The Ascertainable Standard of Conduct*

"The theory of Nuremberg was that the evil deeds consisted of initiation of war and of atrocities in its conduct."<sup>99</sup> That is the substance of the charges against the Japanese war-lords also.

These charges go beyond anything presented against Yamashita. They embrace "analysis and refinement of the prin-

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<sup>97</sup> *Id.* at 351.

<sup>98</sup> These cases effectively cover what would have happened to an application by any of the war-lords.

<sup>99</sup> *FORTUNE*, April 1947, p. 29, statement by technical adviser to U.S. judge at Nuremberg.

ciples of liability, in terms of the deep issues involved in the application of international sanctions to individuals, subject as they are to the demands and the compulsions of the state in which they live. The search was for rules of responsibility that we would be prepared to apply to ourselves."<sup>100</sup>

The standard of conduct ante-dating the offenses was found in such documents as those of Hague Conventions and the Kellogg-Briand Pact.<sup>101</sup> There is little doubt that, at the time of accusation and trial, the charges were specific enough and standards of conduct had been spelled out.

Difficulty arises again from the fact that we do have a doctrine of judicial supremacy and from the position the Supreme Court had taken as to how far the law's prophecies and threats, of application of public force, extend. These trials were "firsts." There was little ground for believing, before Stalin's toast at Teheran,<sup>102</sup> that the contents of these documents were applicable in the way they were applied, or after that toast that they would be applied in the way they were applied. It is true that the trials transcend "an ordinary tort or criminal action" and confront us with "the question history will pose," that to the minds of plain folks there is no reason why, if the little fellows may hang, the big fellows should get off, and that ignorance of the law is no defense. It also is true that, for a long time, we have had the concept of due process of law, and have known that want of a pre-existing rule, suggesting under the circumstances more circumspect conduct, is repugnant to that concept. "Original precedents" hardly in truth supply the need.<sup>103</sup> Men are free from being condemned except for violation of the law they could have known and obeyed.

### *The Evidence*

The evidence consisted largely of captured enemy documents.<sup>104</sup> There was a lot of them and there is no question as to their admissibility

<sup>100</sup> *Id.* at 30.

<sup>101</sup> *Ibid.*, FORTUNE, December 1945, February 1946; LIFE, September 16, 1946, October 14, 1946. It is believed there was no essential difference in the Japanese cases.

<sup>102</sup> FORTUNE, December 1946.

<sup>103</sup> See *supra* n. 61.

<sup>104</sup> See *supra* n. 101. It is believed there was no essential difference in the Japanese cases.

However, "this was not only a problem of weighing and evaluating evidence" in any ordinary setting. It involved "analysis and refinement of the principles of liability"<sup>105</sup>

In our legal system, the first principle of liability is causal connection between the harm done and the conduct of the defendant. Nobody is any the less guilty because he did not act alone, nor because others, who had or may have had as much as or more than he to do with bringing about the harm done, are not at bar with him, may never be at any bar of justice, or perhaps even sit in judgment on him. Still it is necessary to know what the accused himself actually did. The time-tested way of finding this out is to establish what did happen and then to connect the accused, in some measure, causally with that.

Moreover, in these trials we were not engaged merely in hanging the defendants. We were making "an irrevocable moral commitment."<sup>106</sup> Putting the defendants on trial was the means of putting war-making on trial. We wanted to prevent war. To do that we needed to find out how wars are caused so that, knowing how one war had been brought about, we could put our foot down hard at the right place to prevent another. "The search was for rules of responsibility that we would be prepared to apply to ourselves."<sup>107</sup> That requires knowledge.

What happened was the war. With that the defendants were connected, but first it had to be known how the war actually got started. For, as in the great venture of making peace and building a just world "no nation can succeed alone," this war did not get started by any single-handed effort. Only weeks before the guns began to shoot in Europe, there was a pact at Moscow. In the same year as Pearl Harbor, there was another pact at Moscow, offered to the surprised Matsuoka, of which it was then said "it is Japan which has been freed. What has taken place is the removal of the threat to the Japanese flank in Manchukuo."<sup>108</sup> At the trials, the Berlin and Tokyo secret files were open. The evidence would have shown more fully and convincingly how the war did in fact get started, had the Moscow files been there too. This is not idle quibbling that

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<sup>105</sup> *Supra* n. 99, at 30.

<sup>106</sup> *Id.* at 32.

<sup>107</sup> *Id.* at 30.

<sup>108</sup> *NEWSWEEK*, April 21, 1941, p. 28; *NEWSWEEK*, March 10, 1941, *TIME*, July 7, 1941.

compulsory process should have been granted for the examination of Winston Churchill, nor is it doing an ostrich-act in face of the fact the tribunals would have dismally failed had they requested the production of the secrets of the Kremlin. Merely, the evidence was incomplete. It did not show how the war actually was prepared or touched off, nor exactly what hand the defendants had in that series of events.

This evidence provides the basis on which defendants were hanged but it is not the whole story. Due process of law requires, at least aims at, the whole story.

### *Equality*

There is no occasion for comment further than that made above on Yamashita.

### CONCLUSION

Now, does all this mean anything? The dissenting Justices assailed the convictions but the Court did not upset them. Does not that make them lawful? In fact, the Court in the *Yamashita case* says "We conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful."<sup>109</sup> Does that not settle it?

There are, however, different kinds of law and different ways of being lawful. There is the law of the jungle, which is different from the law of due process. Those who object that this is mere rhetoric would catch on right handily were it asserted that, when a President gets the mails into a strike-bound city by military escort, he is acting lawfully. Nobody could fail to perceive that his act might not be lawful by the standards of due process of law, and yet the courts might be unable to do anything about it. Yamashita's conviction too, can be lawful in the sense that it took place through the power of the political branch and the Courts had no power to set it aside, but that does not prove it embodied due process of law.

Alongside the plainest requisites, these trials do not look like due process and no decision of the Court lends any support to calling them "legal" in the due-process sense. In the *Yamashita case*, the Court held the proceedings need not measure up

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<sup>109</sup> *Yamashita v. Styer*, *supra* n. 2, at 353.

to the standards of due process, and the opinion goes far towards characterizing that trial as political.

Hence, it is concluded that the war-guilt trials do not represent due process of law. In that sense they are not law.

This conclusion accords with fundamental instincts and sentiments of the American people.

The ordinary American, layman and lawyer too, is in reality little shocked by the expression, "Give him a fair trial and shoot him." He knows that often the guilt of the accused is as certain and well known before trial as after, but he figures that a fair trial is needed, because doing it that way makes everything open and above-board, shows the world how right we are, and guards against mistakes, which do sometimes occur. He regards "Shoot him first and try him afterwards" as but a bad joke, and he is mighty skeptical about "Why waste time? Shoot him and get it over with." Although he himself occasionally does just that, he is positive it is quite bad practice.

The war-guilt trials were bottomed on and calculated to elicit the support of these common and habitual feelings of the American people. The reason trials were had is that nobody dared to affront them.

But the gorge of an American rises at what he calls "rail-roading." By "railroading" he means "slipping up" on somebody, "faking" evidence against him, not "letting him tell his story," not getting or not trying to get "the whole story." Uninterested in the right of defense as an opportunity for lawyers' monkeyshines, he despises "technicalities." He pays little attention to what he suspects is legal mumbo-jumbo about the sacredness of the right of defense, and is undisturbed by apprehension that "it could happen to him." But he wants to find out what went on and to know what he is doing, and he has a feeling that about the only way the whole story will come out is to let almost everything, including the "kitchen sink," come in, as long as nobody gets nasty about it. And he hates anybody who tries to prevent "everything from coming out in the wash," or who insists that it has when it has not. This sort of thing is sure to arouse his most combative sense of fair play, self-esteem, and curiosity.

These are the reasons why the ordinary American stands up for a fair trial for notorious and evil persons and even for the known guilty, whose acquittal after a fair trial might make

him "hopping mad." It is to get full disclosure that he tolerates widespread abuse of the right of defense.

The sadness of the war-guilt trials lies in the fact that we were less sure afterwards than before, less clear as to what the defendants had done and how they had done it, and not certain of what exactly they had been convicted. They were just guilty. Performance had fallen short of billing and we had not been put before the world to very good advantage. That is deplorable.

#### IV

#### WHY MAINTAIN THE DISTINCTIONS?

This conclusion will not be universally satisfactory. Before the Court took its position, the assertion had been made that these trials are "obviously politics and not law,"<sup>110</sup> and this proposition has, at least by inference, been denied. Running through one form of this denial is a strong suggestion that the trials be called "legally just,"<sup>111</sup> with no attempt to demonstrate that they do embody the requisites of due process of law. Rather there seems a passion of indifference to the fact that they do not, and this deficiency makes the argument sound a little amoral.

However, now that the trials are past, most of the defendants have been convicted and some hanged, all of which is permanent, does there remain any reason, other than that the trials do not represent due process, why the distinctions between politics and legality should be maintained? There are several

1. As indicated above, the word "lawful" has different meanings in varying contexts. So the word "justice" does not always have identical connotations. While justice means "merited reward or punishment,"<sup>112</sup> "it is essential to a clear understanding of this matter to remember that the administration of justice is perfectly possible without law at all."<sup>113</sup> For instance, there is poetic justice, a most satisfying thing.<sup>114</sup> And "revenge," says Francis Bacon, "is a kind of wild justice." He

<sup>110</sup> John Haynes Holmes in *FORTUNE*, February 1946, p. 12.

<sup>111</sup> *Supra* n. 99.

<sup>112</sup> Webster.

<sup>113</sup> SALMOND, *JURISPRUDENCE* (8th ed., London., 1930), p. 40.

<sup>114</sup> *Of Revenge*, *ESSAYS*, (Modern Student's Library, New York, 1908), p. 19.

adds, "which the more man's nature turns to, the more ought law to weed it out," but that does not take away its being "a kind of justice." Much organized force against individuals is often deemed just in a sort of way. However, justice can be done in other ways. It can be administered also according to due process of law.

Thus it appears that justice is an end to be served but more means than one exist whereby to do justice. Although justice always is constructive in some kind of way and reason invariably concludes that its punishments are deserved, the means by which justice is done differ. Moreover, some are bad. The fact that justice has been done does not necessarily mean that the method of its accomplishment is good. This distinction is rendered very plain by recalling that "lynch law often gets the right man."<sup>115</sup> The ends of justice are important. In our legal system it so happens that the method of administering justice also is of surpassing importance. That is what our priceless heritage means.

Keeping these distinctions clear, with regard to the war-guilt trials, entails no obloquy of "standing up for those monsters" and involves no failure to perceive the fact that calling the trials "politics" does not obviate the necessity of evaluating them in terms of justice.<sup>116</sup> Keeping these distinctions clear is actually perceiving and facing the fact that the trials must be evaluated in terms of justice and that doing this requires evaluating them in the terms of the ends they served. This job is not done, but avoided, by characterizing inaccurately, or mis-labeling, the means to those ends—which is what calling the trials

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<sup>115</sup> LIFE, May 28, 1945.

<sup>116</sup> Cf. *supra* n. 99, p. 29. It would be interesting to hear the trials defended on the ground they are preventing war and abolishing atrocities. The next war—and that is the only one worth preventing—will have headquarters in Washington and Moscow. Conceded that men contemplating war or plotting treason take into consideration, to some extent, the contingency of failure and that to them the sanctions are addressed (see *FORTUNE*, April 1947, p. 30), it is hard to detect anybody, in the midst of these powers or their allies or satellites, who may be contemplating war, plotting treason, or committing atrocities, who also is notably deterred by the prospect of the hangman's noose. Anyway, there was not much concern about some atrocities, certainly not much about those in Siberia or Spain, only about other atrocities and perhaps about forcing the surrender of Singapore. There does seem to be a case bottomed on retribution for those events rather than on the preventive aspect of the trials. One wonders why it is not made.

"legally just" does, since that almost certainly pins the due-process label on them. This characterization not only is inaccurate, it also obscures, if it does not render impossible, any genuine evaluation of the trials in the terms of the ends they served and, moreover, befogs and disorders the concept of due process of law. The need of doing the former and the necessity of avoiding the latter present the real issues with respect to these trials.

2. We need to be believed. If the great moral commitment is not to go for nought, we must be believed. Mr. Justice Jackson once said "If you are determined to execute a man in any case, there is no occasion for a trial, the world yields no respect for courts that are merely organized to convict."<sup>117</sup> Since all along nobody had any doubt as to what was going to happen to Yamashita, Goering, and Tojo,<sup>118</sup> the trials had no function except that of exhibiting to the world the superiority of our methods of administering justice and of convincing the world that we meant what we said. Now, calling the trials which occurred true exhibits of due process of law can only forfeit remaining faith that this venture can bear sound fruit. The hope, reportedly expressed by Attorney-General Clark, that the trials would deal out what in Texas is called "law west of the Pecos"<sup>119</sup> has the merit of calling it by its right name.

3. Making distinctions is lawyers' business. It is the task and honor of our profession. The Court did not accord these trials the due-process label. We can profit from that example.

4. The practice of throwing in almost everything and covering it up with a good or bad name does not work any too well for us. Something like that was done on "freedom of contract," of which "bravely re-affirmed on June 1, 1936, a large section was overruled March 29, 1937—a denouement less than glorious."<sup>120</sup>

The unitary dialectic is better left to the exponents of that "false philosophy based on the belief that man is so weak and inadequate that he is unable to govern himself."<sup>121</sup> They

<sup>117</sup> *Supra* n. 115.

<sup>118</sup> *FORTUNE*, December 1945.

<sup>119</sup> *Ibid.*

<sup>120</sup> Snyder, *Freedom of the Press—Personal Liberty or Property Liberty?* 20 B.U.L. Rev. 1, 3 (1940)

<sup>121</sup> President Truman's Inaugural Address, New York World-Telegram, Jan. 20, 1949.



have undoubted genius for the garbage-can technique. If we play them at their own game, we are going to get licked.

## V

## FURTHER EFFECTS OF THE DECISIONS

First of all, the decisions of the war-guilt trials re-emphasize the need of defining our terms.

In the second place, they remind us that there is a large area in which justice does operate through political action. The fact of such an area is not news. Its existence has been known for a long time. However, as Professor Patterson's recent book<sup>122</sup> makes clear, we have been getting more and more Presidential Government. These decisions are additional markers on the way

Aside from placing the war-guilt trials in this area, the decisions leave its boundaries and extent, by careful negation of implications in the *Yamashita case*, to future developments. There does seem some basis though for a surmise that the principles of *Ex Parte Milligan*,<sup>123</sup> as hitherto taken for granted, may be abated to some extent. To what extent no one can anticipate.

Recognition that the trials do not represent due process of law carries with it no license for disclaiming responsibility for them. That would be unworthy of a great people. At least some of our principal enemies did not disavow their acts.<sup>124</sup> We cannot do less.

Meanwhile, these developments furnish subject matter for our courses in Constitutional Law. Since we have justice by political action and justice according to due process of law, lawyers will need to know something—more than judicial process and beyond *Marbury v Madison*—about both, at a minimum enough to discriminate between them. And, while the new or quasi-jurisprudence of these trials is here, it is to be remembered that it is not law. This tub, like any other, must stand on its own bottom.

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<sup>122</sup> PRESIDENTIAL GOVERNMENT IN THE UNITED STATES (Chapel Hill, 1947)

<sup>123</sup> 4 Wall. (U.S.) 2 (1866).

<sup>124</sup> LIFE, April 1, 1946; TIME, March 25, 1946.